ously. It would permit such substantial integration of the BOCs' local exchange and exchange access operations with their operations in the competitive interLATA telecommunications and interLATA information services market as to virtually read the requirement for structural separation out of the Act.

For example, some of the BOCs argue that Section 272(b) would not prevent them and their interLATA affiliates from owning property in common, including the property necessary to provide telecommunications and information services, *i.e.*, transmission and switching facilities. *See, e.g.*, BellSouth, p. 30 (BOC and Section 272 affiliate are permitted to own property in common); Bell Atlantic, p. 5 (proposal to import the separation requirements of *Competitive Carrier* -- which includes a prohibition on the sharing of such facilities -- "run[s] directly contrary to the [1996] Act"); and US West, p. 31 (*Competitive Carrier* requirements "do not fit the bill on the other statutory criteria"). And, as discussed above (pp. 14-17), the BOCs further argue that nothing in Section 272(b) precludes the BOC and its separate interLATA affiliate from sharing in-house administrative and support services and personnel. *See, e.g.*, US West, pp. 22, 24; Bell Atlantic, p. 6; Pacific Telesis, p. 22.

Sprint agrees that, as a matter of corporate governance, the BOC's interLATA affiliate cannot be considered a totally independent entity. It will be part of the same organization as the BOC's local companies and should operate under the same overall

corporate policies. Moreover, Sprint does not believe that the statutory requirement that the interLATA affiliate "operate independently from the Bell operating company" should be interpreted as preventing the parent holding company of the interLATA affiliate and BOC operating company from providing various services and performing various functions for both subsidiaries. For example, both the interLATA affiliate and BOC operating company should be able to look to the holding company for policies concerning human resources, such as hiring guidelines and wage scales, and the administration of various employee benefits, such as the health insurance and life insurance. Of course, the costs incurred by the holding company in providing such corporate governance functions must be fully documented and fairly apportioned between the interLATA affiliate and the BOC operating company.

But, the notion that a BOC and its interLATA affiliate should be able to commonly own (or share) the transmission and switching facilities or other property, *e.g.*, the buildings housing such plant, which are necessary to provide telecommunications and information services, simply cannot be squared with any rational interpretation of the requirement of Section 272(b)(1) that the BOC and its separate affiliate operate independently. Independence, in this instance, means totally separate operations and "arm's length" dealings. Any intermingling of property between the BOC and its interLATA affiliate would invariably lead to the manipulation and misallocation of costs by the BOC,

thereby harming consumers and competition. *See* Sprint, pp. 19-24; AT&T's, pp. 19-24; MCI, pp. 23-27.[20]

Similarly, as Sprint explained in its initial Comments (pp. 24-27), any plausible interpretation of the Section 272(b)(3) requirement that the BOC and its affiliate must have separate officers, directors and employees precludes the sharing of in-house functions such as operation, installation, and maintenance personnel even through a holding company or other contrivances, *e.g.*, a second affiliate. Otherwise, the BOC would be afforded a license to discriminate and cross-subsidize since the holding company or other artifice would have virtually unbridled discretion to allocate the costs of such shared services and personnel between the BOC and the interLATA affiliate so as to further the overall interests of the company. *See* AT&T, pp. 24-25 ("The sharing of in-house services ... is ... inconsistent with the concept of separate personnel" because it "would increase the amount of joint and common costs, and the necessity for allocating these

[20] The sharing of switching, transmission and other telecommunications property necessarily means that the BOC's interLATA affiliate would not pay same tariffed rates as non-affiliated interLATA carriers for such plant. In order to eliminate the possibility of double recovery, the BOC would have to reduce the charges to its interLATA affiliate to account for the costs allegedly incurred by such affiliate on account of such sharing or common ownership. This would give rise to a situation similar the one in which after divestiture AT&T and the BOCs shared network facilities (SNFAs) which were used for both interLATA and intraLATA functions. The Commission found that certain of the facilities provided by the BOCs to AT&T under SNFA were like special access facilities provided by the BOCs to other IXCs under tariff and that the disparity in charges may violate Section 202(a) of the Act. *See Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd 1059 (1993).

costs, that the requirement of separate personnel was enacted to reduce."); *see also,* CompTel, pp. 18-20; and MCI, p. 28.[21]

Because the BOCs retain their substantial market power in the exchange and exchange access markets throughout their regions and in the largest communities within their regions, entry by the BOCs into their in-region interLATA markets exposes "both ratepayers in [these] local markets controlled by the BOCs and competitors of the new BOC service providers to the potential risk of improper cost allocations and unlawful discrimination." *NPRM* at ¶9. Although the prophylactic remedy of proscribing such entry entirely would be the best way to control such risk, this remedy may no longer be possible once the BOC satisfies the conditions for entry under Section 271(d)(3). The second best regulatory solution for minimizing this risk is the structural separation of the BOCs' monopoly and competitive entities. The Commission has been given an unequivocal mandate under Section 272(b) to impose such structural separation. It should fulfill this mandate by rejecting the BOCs' attempt to eviscerate the structural separation requirement and by requiring separation between the BOC and its interLATA affiliate as recommended by Sprint in its initial Comments.

[21] As noted in its initial Comments (p. 26, n. 19), Sprint does not believe that the sharing of services provided by a independent entity on a outsourcing basis raises the same concerns as the sharing of in-functions as long as the BOC and its interLATA affiliate each pays its appropriate share of the fair market value for such services.

VI. JOINT MARKETING

The Commission should also reject the BOCs' reliance upon the joint marketing provision of Section 272(g) to eviscerate the structural separation requirements of Section 272(b). The BOCs argue that the joint marketing provisions would permit them to provide a host of activities on an integrated basis, including selling services through one sales force; performing "back office" coordination; advertising the availability of bundled services; and providing bundled discounts for the purchase of both services. *See, e.g.*, Ameritech, p. 52; SBC, p. 13; Nynex, p. 17, and Pacific Bell, p. 40. The types of joint marketing activities suggested by the BOCs as permissible under Section 272(g) would clearly conflict with the separation requirements of Section 272(b), especially the requirement that the BOC and its interLATA affiliate "operate independently" and the restriction on the sharing of employees.

Some BOCs argue that because their local company employees marketing their interLATA affiliates' services would not be employed by the interLATA affiliate, they would not run afoul of the Section 272(b) separation requirements. *See, e.g.*, BellSouth, p. 10, n. 17. But, their attempted distinction here cannot withstand scrutiny. Given the BOC's monopoly-endowed advantages within its region, most customers will likely continue to contact the BOC's business offices to arrange for local service. Thus, the BOC would likely become a significant, if not primary,

sales channel for the interLATA services of its affiliate. The affiliate would be able to employ fewer people in its own sales organization and instead rely upon the BOC's sales channels. Moreover, if the compensation of the BOC's sales people was dependent, at least in part, upon the amount of business they generated for the interLATA affiliate, their "fate" would be inextricably linked to the success of the interLATA affiliate. The BOC and its interLATA affiliate could in no way be considered to be operating independently, and this would be discriminatory as well.[22] For these reasons, Sprint believes that the Commission's suggestion that the BOC and its local affiliate be obligated to contract with a unaffiliated third party for any joint marketing activities is meritorious and necessary if the Commission is to ensure that the separation requirements of Section 272(b) are rigorously enforced.[23]

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[22] If a call to a BOC business office results in an effort by the BOC business office employee to convince the caller to subscribe to the BOC's interLATA affiliate, there would be an undeniable public perception that there is no separation between the BOC and its interLATA affiliate. The BOCs claim that such employees would simply be agents. They would not be perceived as employees of the interLATA affiliate any more than independent CPE vendors are considered BOC employees when they sell BOC services in conjunction with CPE. *See e.g.*, Ameritech, p. 51. Sprint agrees that a Radio Shack employee, for example, selling a BOC's service along with CPE, will probably not be confused for a BOC employee. But the line becomes increasingly blurred when a Ameritech local company employee sells the services of the Ameritech interLATA affiliate. Any distinction will all but disappear, if, as the BOCs advocate, the local company employees also serve as the contact point for customers of the long distance affiliate after the sale is made. *See* AT&T, p. 54.

[23] Nynex argues (p. 17) that the joint marketing provision of Section 272(g) would permit its local companies to steer sales to its interLATA affiliate. However, regardless of the joint marketing provisions of the Section 272, the BOCs continue to have equal access obligations under the Act. Nynex's steering of customers to its own affiliate would violate such statutory obligations. *See* AT&T, pp. 57-59.

Finally, the Commission should reject Ameritech's argument (p. 49) that the IXCs subject to Section 271(e) "may not engage in the joint marketing of any services purchased under Section 254(c)(4), even if that carrier is also providing ... the same service through the purchase of unbundled network elements." Ameritech claims that this restriction is necessary because IXCs may "serve some customers through the purchase of network elements and others through resale of LEC services," *id.*; that IXCs could thereby "evade the intent of section 271(e) by serving just one customer through the purchase of unbundled elements and the rest through resale," *id.* at 50; and that Congress surely "did not countenance such a result." *Id.*

As Ameritech acknowledges, Section 271(e) is, by its terms, limited to BOC services obtained through resale. If an IXC subject to Section 271(e) marketing restriction serves some customers through resale and others through the purchase of network elements, it obviously will be required to limit its joint marketing activities to those customers which it serves an a facilities basis. If Ameritech believes that this is problematic, it may request action by the Commission to enforce the Section 271(e) restriction. What it cannot do is have the Commission adopt a prophylactic solution which would proscribe the joint marketing of BOC network elements in all cases where the IXC is also providing BOC services through resale. This would read out of the Act the facilities exception to the joint marketing re-

striction. Plainly, the Commission cannot, consistent with Congressional intent, adopt such an approach.

VII. ENFORCEMENT MECHANISMS

In its comments, Sprint pointed out that the ability of the Commission to use the complaint process to enforce continued compliance with the entry conditions in Section 271(d)(3), and to protect against the discrimination which these conditions prohibit was, of necessity, limited. Sprint also pointed out that the limited nature of the relief that could be afforded through the complaint process needed to be recognized by the Commission in determining whether BOC entry into the interLATA market was consistent with the "public convenience and necessity" and otherwise warranted under Section 271(d)(3); and that it also needed to be considered by the Commission in determining how to apply the separation requirements mandated by Section 272.

The Commission plainly does not have the resources necessary to process multiple, complex complaints and even if it did, it would be very difficult to process such complaints within the 90 days allowed under Section 271(d)(6)(B). Because most, perhaps almost all, complaints will rely upon specific information within the exclusive possession of the BOCs, discovery will be required to obtain such information and such discovery cannot readily be accommodated within a 90-day timeframe. Even if this timeframe could be expanded -- a course permitted under Section 272(d)(6)(B) only if both parties agree -- the delays inherent in

a full blown investigation would likewise be antithetical to effective enforcement. The harm to competition that would inevitably occur during such an investigation will in many instances prove difficult or impossible to undo. It would seem fair to presume that the 90-day limitation contained in Section 271(d)(6)(B) reflects the view of Congress that violations under Sections 271 and 272 must be expeditiously remedied in order to prevent harm to competition.[24]

To solve the dilemma created by the conflicting needs of expedition and the time necessary to develop a full record, the Commission asked that the parties consider suggestions to give complainants a more even-handed opportunity to prove a violation. In particular, the Commission found that "...burden-shifting may be a means of facilitating the detection of alleged anticompetitive behavior by the BOCs..." and it asked for comments "on whether the burden should shift to the defendant BOC once the complainant makes a *prima facie* showing that a BOC has ceased to meet the conditions of section 271(d)(3)..." (¶102).

For the most part, the BOCs responded to the Commission's request for suggestions by denying the need for any relief and by simply refusing to even recognize that the 90-day time limit in

[24] Nynex states (p. 74) that "[t]he 90-day deadline recognizes the need for the Commission to act quickly in requiring compliance with conditions on an in-region interLATA application that may be necessary for competitors to stay in business." *See also* AT&T, p. 47.

Section 271(d)(6) might create a potential problem. For example, U S West argued that"...there is no reason for the Commission to propose new procedures to implement the enforcement provisions of Section 271"; that "...alert BOC customers and competitors alike will be on the constant lookout for any perceived BOC deficiencies, and more than happy to report on those items directly to the Commission"; that "[t]hese customers and competitors include some of the largest and most sophisticated telecommunications providers in the world..."; that "[t]hese companies are certainly no strangers to the Commission's current complaint process"; and that "...the Commission will have a wealth of knowledge provided by the BOCs themselves in the form of biannual audits...and other similar Commission reporting requirements" (at 60-61). Similarly, Ameritech argued that "...any informational asymmetry is bound to be far less pronounced" than the Commission has anticipated because complainants are "likely to be...telecommunications carriers" with "the experience, resources and technical and operational knowledge to identify violations..." and to also have publicly available to them "much of the information that might be relevant to a complaint" (at 75).[25]

These arguments are hardly persuasive. Even assuming that complaints under Section 271(d)(6) will be brought in many in-

[25] *See also* Pacific at 42: "[I]t should be noted that BOC competitors--often very large, sophisticated companies--are the most likely complainants. Such companies do not need unusual procedural relief from the normal burdens of litigation."

stances by large telecommunications carriers familiar with the Commission's complaint process, this does not mean that such carriers will somehow be able to obtain special access to the information necessary to prove discrimination. Nor does the identity of the party bringing the complaint make it any easier for such party to obtain full discovery from the BOCs within a 90-day timeframe. And, such information will clearly be necessary. To give but a few examples, any attempt to show that a BOC has discriminated in favor of its own interLATA affiliate by giving it better, more modern facilities; by installing such facilities more rapidly or at lower cost; by responding more promptly to the affiliate's service calls; by adopting standards or practices which have the effect of favoring the affiliate; or by denying the affiliate's competitors reasonable interconnection; will typically require access to BOC records. The interLATA competitor may know how it has been treated, and it may believe that it has been treated unfairly, but it will generally not have full information as to comparable treatment by the BOC of the BOC's own affiliate. This lack of information, in turn, would compel a complainant -- even a large, experienced complainant -- to seek such information through the discovery process.

In any event, even assuming that the BOCs are correct and that much information is publicly available, this would not seem to strengthen the BOC's argument. As Sprint reads the Commission's NPRM, there is no intent to relieve complainants of any

obligation to avail themselves of information which they may be reasonably expected to obtain from public sources. Thus, where there is no need to rely upon information within the exclusive possession of the BOCs and where discovery is therefore not an issue, there will be no shift in the burden of proof from complainant to a defendant BOC. Consequently, to the extent that BOCs are correct that much information is publicly available, there is no need to expect that this will result in any diminution of the burden ordinarily borne by a complainant.

It is less clear whether the Commission, in suggesting a shift in the burden of proof where a *prima facie* case has been made out, was referring to a shift not only in the "burden of going forward," but also in the "burden of ultimate persuasion." If the Commission was referring only to a shift in the burden of going forward, its proposed assistance for a complainant is unremarkable. The burden of going forward always shifts when a complainant has made out a *prima facie* case, and, indeed, the term *prima facie* case would normally be defined as a case sufficient to place the burden of going forward on the defendant. To shift the burden of ultimate persuasion would be more unusual, but it would not necessarily be of any practical significance. It is Sprint's view that few if any complaint cases are likely to be decided based on whether complainant or defendant has to show or not show that a violation had or had not been committed, based upon a preponderance of the evidence. For this reason, it is

Sprint's view that nothing much will be gained by shifting the burden of ultimate persuasion, and it is just as well (given possible confusion and legal complications) that the Commission leave things as they are.

Several of the BOCs argue further that a 90-day time period is sufficient to allow for a meaningful discovery and that the Commission can address any problem "through shortened pleading and review cycles" (U S West, p. 63). Pacific goes so far as to argue that not only can discovery be accommodated within a 90-day timeframe, but that the Commission should also hold "an oral evidentiary hearing" during the same timeframe "when justified by the circumstances" (p. 44). Pacific explains that a "trial-type hearing is more conducive to resolving the highly technical, complex matters that may be at issue" (p. 45). Pacific's argument belies not only all complaint experience at the Commission, but common sense as well. There can be no realistic expectation that significant discovery -- not to mention a trial-type hearing -- can be undertaken and completed in a 90-day timeframe.

Ameritech has a different solution. After conceding that some complaints may involve "thorny issues and complex fact patterns that could not be flushed out in the 90-day timeframe" (p. 76), Ameritech urges that complainant rely on Section 208 in such cases. Surely, it could not have been the intent of Congress to limit relief under Section 272(d)(6)(B) to situations where "...the case is straightforward and the facts are not in dis-

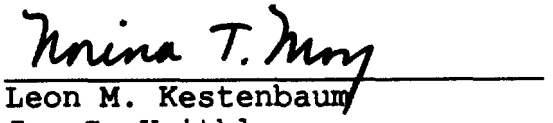
pute..." (*id.*). Ameritech's "remedy" would go a long way towards writing Section 271(d)(6)(B) out of the Act and leave complainants with no choice but to rely on more protracted litigation. As already noted, this is contrary to the view of Sprint and others that the 90-day timeframe in Section 271(d)(6)(B) reflects Congressional awareness of the need for expedition in cases where BOC conduct in violation of Sections 271 and 272 may threaten competition.

In its initial comments, Sprint urged the Commission to find that complainant has made a *prima facie* case if it (1) alleges all the facts necessary to show a specific violation under Section 271(d)(3), and (2) presents all evidence in support of such facts which it may reasonably be expected to be in a better position to obtain than the defendant BOC. When such a *prima facie* case has been made, the burden would then shift to the BOC defendant and the BOC would become responsible for presenting rebuttal evidence to deny complainant's allegations. Sprint believes that it is not possible at this time for the Commission to go further and define the requirements for a *prima facie* case under different factual circumstances. On the other hand, there is nothing in the modest relief for complainant suggested by Sprint which would in any way encourage "frivolous" filings, which raises any

legal problem, or which would otherwise prejudice the BOCs in defending complaints.[26]

Respectfully submitted,

SPRINT CORPORATION



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[26] Bell Atlantic argues that if the Commission decides to shift the burden of proof in complaint cases, "competitors would line up for blocks with frivolous complaints." Presumably, Bell Atlantic does not mean to be taken literally here. Still, the idea that there would be a multitude of complainants seems at odds with the idea that complainants will be primarily large and experienced competitors well aware of Commission complaint procedures.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Comments** of Sprint Corporation was sent by United States first-class mail, postage prepaid, on this the 30th day of August, 1996 to the below-listed parties:

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